



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 30 2007

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SENSITIVE

VIA FAX AND CERTIFIED FIRST CLASS MAIL

Steven R. Ross
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

RE: MUR 5642

Dear Mr. Ross:

Based on a complaint filed with the Federal Election Commission, and information supplied by your client, the Commission, on April 18, 2006, found that there was reason to believe George Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10, provisions of the Federal Election Campaign Act of 1971, as amended, and the Commission's regulations, and instituted an investigation in this matter.

After considering all the available evidence, the Office of the General Counsel is prepared to recommend that the Federal Election Commission (the "Commission") find probable cause to believe that your client, George Soros, violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10. Enclosed for your review is a brief stating the position of the General Counsel on the legal and factual issues of this matter.

You may file a brief stating your position on the issues and replying to the brief of the General Counsel. Your brief should be submitted to the Secretary of the Commission (ten copies if possible) within fifteen days of receipt of this notice. Three copies of your brief should also be forwarded to the Office of the General Counsel, if possible. The General Counsel's brief and any brief you submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within fifteen days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing at least five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not grant extensions greater than twenty days.

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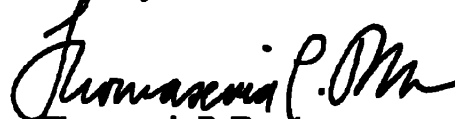
Steven R. Ross, Esquire
MUR 5642
Page 2

You may also request an oral hearing before the Commission. See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed. Reg. 7551 (Feb. 16, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

The Commission may or may not approve the General Counsel's probable cause recommendation. If the Commission finds probable cause to believe a violation has occurred, the Office of the General Counsel will contact you and attempt, for a period of not less than thirty days, but not more than ninety days, to settle this matter through conciliation.

Should you have any questions, please contact Ann Marie Terzaken at (202) 694-1650.

Sincerely,


Thomasenia P. Duncan
Acting General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3
4 In the Matter of)

5)
6 George Soros)

MUR 5642
7)
8)
9)

10 **GENERAL COUNSEL'S BRIEF**
11

12 **I. INTRODUCTION**

13 *This matter arose from a complaint filed with the Federal Election Commission, alleging*
14 *that George Soros violated the Federal Election Campaign Act of 1971, as amended, ("the Act").*
15 *The complaint alleged, among other things, that Mr. Soros failed to report as an independent*
16 *expenditure the cost of a mailing list he used to send two million brochures expressly advocating*
17 *the defeat of President Bush in the 2004 General Election. After considering the complaint, Mr.*
18 *Soros's response to the complaint, and publicly available information, the Commission found*
19 *reason to believe that Mr. Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 by failing to*
20 *report independent expenditures for the mailing list. See Factual and Legal Analysis for George*
21 *Soros (setting forth basis of reason to believe findings).*

22 *The ensuing investigation confirmed that Mr. Soros paid \$272,000 for a mailing list for*
23 *the communication at issue and that he failed to report the expenditure. Based on the results of*
24 *the investigation, which are set forth and analyzed below, we are prepared to recommend that the*
25 *Commission find probable cause to believe that George Soros violated 2 U.S.C. § 434(c) and*
26 *11 C.F.R. § 109.10 by failing to report an independent expenditure.*

II. SUMMARY OF FACTS

During September and October 2004, Mr. Soros mailed a packet to two million potential voters. The brochure enclosed with the packet clearly stated numerous times that President Bush should not be re-elected, including the headline, "Why We Must Not Re-elect President Bush." Complaint, Attachment C. The packet also contained a four-page pamphlet written by Mr. Soros that detailed why he opposed the re-election of President Bush.

In connection with the mailing, Mr. Soros disclosed independent expenditures of \$747,680.00 to EU Services, Inc., a direct mail production company, for printing, postage, and handling, \$7,932.50 to Ann Wixon for managing the mailing production, and \$2,500.00 to Karol Keane for brochure design. All three expenditures were reported as occurring on October 4, 2004. Mr. Soros did not, however, disclose any expenditures related to the costs of renting or purchasing a mailing list.

During the investigation, Mr. Soros confirmed that, in connection with the mailing, he paid \$272,211.68 to ClientLogic for a mailing list that comprised addresses of magazine subscribers and that this disbursement was not disclosed to the Commission. Letters from Steve Ross, dated July 24, 2006 and September 1, 2006. Mr. Soros also provided copies of wire instructions and a cancelled check to substantiate the cost of the mailing list.¹

¹ In a memorandum dated September 22, 2004, Dan Eule, an employee of Soros Fund Management, instructed that \$286,850 be transferred from Mr. Soros's account to ClientLogic. Letter from Steven Ross, dated September 1, 2006, at 2. In a memorandum dated October 12, 2004, Mr. Eule instructed that a refund check in the amount of \$14,638.32 from ClientLogic be deposited into the account of Mr. Soros. *Id.* at 3-4. Accordingly, the actual cost of the mailing list was \$272,211.68.

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III. ANALYSIS

An independent expenditure is "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate."² 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. An individual may make unlimited independent expenditures but is required to disclose those expenditures to the public through reports filed with the Commission if, in aggregate, they exceed \$250. 2 U.S.C. § 434(c); 11 C.F.R. §§ 100.16, 104.4(g), 109.10; *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). Each disclosure must include, among other things, the name and address of each person who receives a disbursement from the individual in connection with the independent expenditure, along with the date, amount, and purpose of any such independent expenditure. See 2 U.S.C. §§ 434(b)(6)(B)(iii) and 434(c)(2)(A).

It is undisputed that Mr. Soros made a \$272,000 disbursement for the mailing list to distribute a communication expressly advocating the defeat of President Bush and that he did not disclose it. Mr. Soros asserts he was not required to report the mailing list rental based upon his interpretation of Advisory Opinion 1979-80 and his contention that there is no other "statutory, regulatory or advisory opinion guidance on the question of whether the cost of a mailing list . . . is the functional equivalence of the cost of actual production and distribution of the communication." See Letter from Steve Ross, dated July 24, 2006, at 2.

² Under the Commission's regulations, a communication contains express advocacy if, among other things, it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates for Federal office, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL") ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature.").

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1 In AO 1979-80, a multi-candidate committee, the National Conservative Political Action
2 Committee ("NCPAC"), sought to make an independent expenditure but was concerned that
3 renting mailing lists from a party who also rented lists to the opposing candidate would constitute
4 impermissible "common vendor" coordination. AO 1979-80. The Commission concluded that,
5 regardless of whether or not the list broker was an agent of the opposing candidate, the list rental
6 was an operating expense because NCPAC was "neither making any communication by renting
7 the list nor [was] it making an independent expenditure through the broker." *Id.* Thus, the
8 Commission concluded the use of a common list broker would not make the broker a common
9 vendor or constitute prohibited coordination. *Id.* Mr. Soros argues that the Advisory Opinion
10 requires mailing list costs to be included as operating expenses, as opposed to being part of the
11 communication. If the mailing list is not part of the communication, he contends, a disbursement
12 for a mailing list cannot be an independent expenditure.

13 The analysis of AO 1979-80 does not apply, because the facts underlying this matter are
14 materially distinguishable from the factual scenario presented in the AO: specifically, Mr. Soros
15 is an individual and not a political committee. Cf. 2 U.S.C. § 437f(c). Further, as a practical
16 matter, in the case of an individual, list broker expenses – or *any* expenses, for that matter –
17 would not constitute operating expenses, because individuals simply do not have "operating
18 expenses" in the sense contemplated by AO 1979-80 or by the disclosure requirements for
19 committees in 2 U.S.C. § 434(b)(4)(A). Also, the reporting impact of categorizing a
20 disbursement as an operating cost instead of an independent expenditure is drastically different
21 for a committee as opposed to an individual. For a committee, it merely changes *where* – that is,
22 on what form – the disbursement must be disclosed to the public. See 11 C.F.R. § 104.3. For an
23 individual, it would change *whether* the disbursement must be disclosed to the public at all.

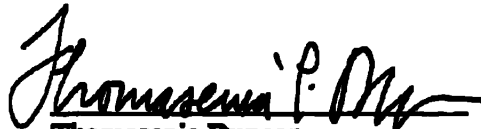
Moreover, the analysis in AO 1979-80 pertaining to political committees has been effectively superceded. The Explanation and Justification of the most recent amendments to 11 C.F.R. § 104.4(f), published in the Federal Register on January 3, 2003, makes clear that both production and distribution costs associated with an independent expenditure made by a political committee are reportable on Schedule E as independent expenditures. See Explanation & Justification, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 407 (Jan. 3, 2003). Under the regulations in force at the time Mr. Soros purchased the mailing list, the only time such disbursements are reportable on Schedule B as "operating expenses" is when the production and distribution costs are incurred in one reporting period, and the public distribution of the independent expenditure occurs in a later reporting period. And even then, the costs must still be reported a second time, on Schedule E of the subsequent report, as part of the independent expenditure. See *id.*

Because the mailing list used to send Mr. Soros's brochure, and the disbursements to obtain it, was an integral part of the communication's distribution – indeed, the mailing could not have been produced or publicly distributed to two million potential voters without it – the mailing list disbursement is an independent expenditure. Furthermore, because the amount of the disbursement is greater than \$10,000 and was made on September 22, 2004, more than 20 days prior to the General Election, Mr. Soros was required to disclose the disbursement for the mailing list within 48 hours, or by September 24, 2004. See 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10(c). Because Mr. Soros failed to report the disbursement for the mailing list as an independent expenditure, we are prepared to recommend that the Commission find probable cause to believe Mr. Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 by failing to report disbursements associated with acquiring the mailing list.

IV. GENERAL COUNSEL'S RECOMMENDATION


1. Find probable cause to believe that George Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 by failing to report an independent expenditure.

4/30/2007
Date


Thomasenia Duncan
Acting General Counsel


Ann Marie Terzaken
Acting Associate General Counsel for Enforcement


Julie Kara McConnell
Acting Assistant General Counsel


Tracey L. Ligon
Attorney

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